United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77/1017

To Be Argued By:
HELENA PICHEL SOLLEDER

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

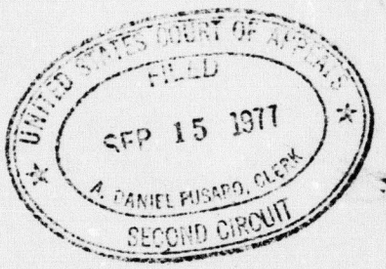
- against -

PHILIP FLOYD TOLLIVER,

Defendant-Appellant.

Docket Nos.
77-1017
77-2055

DEFENDANT-APPELLANT'S
MEMORANDUM OF LAW



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STATEMENT:

Defendant has appealed from two adverse decisions: One, a judgment of conviction entered by Judge Dooling on December 17, 1976 in the United States District Court for the Eastern District of New York; two, a judgment upon a decision rendered by Judge Dooling on April 20, 1977 denying appellant's motion brought under Title 28, Section 2255. The judgment of conviction followed a verdict by a jury which found appellant guilty of counts 1 and 3 of an indictment charging him with violations of Title 18, Section 2113 (a), 2 and 371 - aiding and abetting and conspiracy to commit bank robbery. Judge Dooling sentenced the appellant to concurrent prison sentences of ten (10) years and five (5) years on the two counts, to be commenced upon completion of a sentence imposed on him in the Eastern District also on July 6, 1967 which was to expire in 1982 for a similar crime, bank robbery.* Croft received a

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*According to defendant the parole board had violated him and will require him to serve from 60-72 months before he can commence serving the present sentence. It also held that the five years which defendant had spent on parole were not to be credited towards that first sentence.

ten (10) year jail sentence. Both defendants were sentenced pursuant to Title 18, U.S. Code Section 4205(b)(2) and both are presently incarcerated in Lewisburg, Pennsylvania.

Following his conviction defendant filed a notice of appeal at which time he was represented by Legal Aid Counsel Marion Seltzer who had also represented him during the trial. Thereafter on March 28, 1977 defendant filed the above motion under Section 2255 seeking to set aside his conviction on the ground that he was denied effective assistance of counsel. The appeal from the judgment of conviction was stayed and Judge Dooling assigned a Criminal Justice Act counsel to represent the defendant on the 2255 motion. From Judge Dooling's decision denying that motion the Court-assigned counsel filed a Notice of Appeal to this Court and moved to consolidate both appeals. That motion was granted and present counsel was assigned to prosecute both appeals on behalf of defendant.

The indictment contained three (3) counts. In count 1 defendant and co-defendant Croft were charged with robbery of the Marine Midland Tinker National Bank, 1995 New Highway, East Farmingdale, New York of approximately $17,000 on July 20, 1976. Count 2 charged both defendants with the use of force and violence in the robbery of the above money in violation of Section 2113 (d); count 3 charged both defendants with a conspiracy to commit the above two crimes, that is violations

of Sections 2113(a) and 2113(d). The overt act charged was that on July 20, 1976 both defendants rode together in a white 1973 Cadillac bearing New York license plate number 180BMR, in violation of Section 371, Title 18 U.S. Code. All three counts charged aiding and abetting under Section 2, Title 18. After four days of trial and the testimony of eleven (11) witnesses and the receipt of fourteen (14) exhibits, at the close of the government's case, the defendant Croft pleaded guilty to count 2 of the indictment which charged him with bank robbery in violation of Section 2113(d), leaving defendant Tolliver at the mercy of the jury which, as we have seen, convicted him of two counts.

Defendant Tolliver's counsel elected not to seek a mistrial but to inform the jury of the plea and let them decide the defendant's guilt or innocence. She called no witnesses on behalf of the defendant Tolliver.

Prior to the trial, defense counsel moved to suppress the line-up identification of the defendant by a witness on the ground that she had been excluded at the time the witness made the identification itself as well as at the time the witness had two conversations with FBI agents, police officers and the Assistant United States Attorney. The Court held a hearing on the question of the suppression and denied defense counsel's motion.

The basis for the 2255 motion - that is the denial of the effective assistance of counsel - rested on the failure of counsel to seek a mistrial when Croft pleaded guilty, the failure of counsel to call the defendant Croft as a witness on behalf of defendant Tolliver, and the failure of counsel to cross examine the witness who had identified defendant at the line-up respecting his inability to identify defendant the first time he viewed him in the line-up.

QUESTIONS PRESENTED

1. Whether the combined errors of the Court and counsel in the face of the co-defendant's plea of guilty deprived appellant of a fair trial and of effective representation.

2. Whether the identification of the witness Zima of defendant was in violation of his constitutional rights.

3. Whether there was sufficient independent evidence to sustain the conviction.

4. Whether the Court should have set aside the conviction under Section 2255.

STATEMENT OF FACTS:

Although defendant Tolliver was charged with aiding and abetting and conspiring with Croft in the robbery of a bank and placing lives in jeopardy, the government proceeded on the theory and the proof showed that Croft and another man, not apprehended committed the actual robbery while armed with guns and wearing ski masks and that defendant Tolliver's role was limited to that of an aider and abetter in that he drove the "switch car" - the white Cadillac which helped the actual robbers escape; that the white Cadillac was registered in the name of defendant's wife and that it was parked a short distance from the bank; and that the two robbers, escaping from the bank with the loot, drove a green and white Pontiac which they subsequently left and got into defendant's car driven by defendant; that about 15 minutes later defendant and Croft were apprehended in the white Cadillac but that no guns, masks or money were ever found in that car.

THE SUPPRESSION HEARING:

Prior to the trial the Court held a hearing on the defendant's counsel motion to suppress and look into the propriety of the identification procedures on the ground that counsel had been excluded from the room where the witnesses actually viewed the line-up as well as from a conversation which the witness had with agents, a police officer and the assistant U.S. attorney who tried the case. A hearing was had by Judge Dooling on this.

Originally on the very morning of the robbery witness Zima had identified the two defendants at a "show-up". The facts surrounding this were as follows. After the witness Zima took the police to where the green and white Pontiac was, the police returned to keep Zima there, they were informed that the two defendants had been picked up in a white Cadillac. Agent Sweeney made a determination that Zima should identify the two men who had been arrested in the white Cadillac as quickly as possible. The witness was brought to a wooded area where he was not to be seen by the defendants. He stood behind one of the agents and looked over the shoulder of the agent as each defendant was brought within his view. He then identified Tolliver as the driver of the white Cadillac and Croft as the driver of the green and white Pontiac. The testimony was conflicting as to whether each defendant was accompanied by a police officer at that time. The question was never resolved. There is also conflicting testimony as to whether Zima knew that these two men had been arrested in the white Cadillac and whether he saw the white Cadillac in the area.

Defense counsel moved on behalf of Tolliver for a line-up which was held on September 23, 1976 in the Suffolk County Sheriff's Office in Riverhead, New York. The witness Zima as well as counsel for the defense, Assistant U.S. Attorney Adlerstein and Special Agent Lawrence Sweeney of the FBI appeared at that line-up. Because of what she claimed were irregularities and illegalities in the conduct of the line-up counsel then

moved for a suppression hearing. In her affidvait counsel stated that she would not be permitted to be present at the time the witness made his identification of the men in the line-up. She objected to this procedure as a critical stage of the proceedings to which the U.S. Attorney replied that this is the way he would conduct a line-up and that if she did not agree he would"cancel the whole thing". It appeared that the witness viewed the line-up through a one-way mirror. After he did so he went into a back room. Apparently at that time he advised the Assistant U.S. Attorney and the agent that he wished to view the men in the line-up wearing sunglasses. That sunglasses were provided one at a time to the persons in the line-up and the witness returned and after the second viewing the witness identified the defendant who at this point was number 1 in the line-up, as being the person he had seen on July 20th. In the first line-up the defendant Tolliver had been number 5 out of a total line-up of 6 men, and the witness had picked out number 6. Claiming that there was a possibility of suggestion in the procedures used, counsel requested a hearing which the Court granted and held. At the hearing the witness Zima testified that the police wanted him to identify the "two suspects in question in a line-up where there was one in the group of six." (TR 222). He described the procedure which he followed which was to, by a nod of a head or a gesture indicate, to the agent Sweeney whether he could make an identification or not. After

viewing the first line-up he motioned to Agent Sweeney who then went into a room with the agent, the police and the Assistant U.S. Attorney and said that he wanted to see the line-up in profile and also he wanted them wear eyeglasses. That he thought that defendant was number 6 when in fact he was number 5. The eyeglasses were provided, the witness went back again, motioned the agents that he was ready, came back and said that this time he was sure that number 1, who was the defendant, was the driver of the white Cadillac. The testimony of Sweeney was to the same effect. (TR 176-192, 222, 232). There was also testimony from Police Officer Ryan concerning the show-up procedures and from FBI Agent Sooker and Police Officer Smith. (TR 37-121).

Counsel made no motion with respect to the show-up procedures but limited herself to questioning the legality of the line-up. The Court held that there was no unduly suggestive action on the part of the police. The Court also denied the motion to suppress the statements taken from both defendants. (TR 269-274).

THE TRIAL:

There were three bank employee witnesses:

(1) Parkhill testified that he was the manager of a Marine Midland Bank in East Farmingdale. That on July 20, 1976 wo masked men came in with guns drawn, ordered the tellers and the customers to the floor and emptied the cash drawers; that the bank cameras started running at that time; that neither man was husky, both were black, that they got out and drove a green Pontiac. On cross examination when the defendant stood up and he was asked if the defendant was one of the people in the bank he replied no; and he gave the same answer as to Croft. This witness failed to identify either Tolliver or Croft. (TR311-339).

(2) Elayne Brown testified that she was a platform secretary, that she saw two men enter the Bank, both negroes, masked, that they ordered everybody to lie down; that they left in the car; that she was under the desk and all she could see were feet during the progress of the robbery; that the car went south; that she saw the license plate and that after having been told the license plate by a fellow worker she looked at it and wrote it down. This witness also was unable to identify either defendant; in fact, she said the defendant was not one of the men. (TR339-361, 353, 359).

(3) Lisa Chiranky - teller - saw a man with a mask who pointed a gun at her and told her to put the money in a brown bag which she did, that she also gave him the night deposit bag; she saw a green car, noted its license plate and wrote it down. This witness did not identify defendant as one of the men, she said he could be the man, but in fact she was unable to identify either defendant. (TR361-370).

(4) Dr. Bernadino Galluppi, a customer of the bank, was in the bank when he saw a masked man come in with a gun, pointed the gun at him, knocked him down, took money; the man with the gun said that he would shoot him. This witness also could not identify the defendants. (TR370-380).

(5) Michael Leiblein - a customer of the bank who entered while the robbery was in progress, was told to lie down by the man with the gun, one man was running and yelling "put money in bag". When asked to look at the defendant he testified that defendant was not one of the robbers, in fact he could not identify either defendant. (TR382-396).

(6) James Zima - before this witness testified the government informed the Court and counsel that he wanted to go into the prior identification of the defendant Tolliver by the witness on the theory of disclosure. When the defendant's counsel objected, the Court ruled that the government could not underline the identification and counsel for the government therefore asked no questions concerning the witness' prior identification of the defendant Tolliver, except to have him say he had seen defendant a second time on the day of the robbery and to have him identify defendant in court.

This witness testified that he was a salesman, that he was driving his car having just left one customer and was on his way to another customer and that he was going along east on Central Avenue when he saw in his rear view mirror a green and white Pontiac coming at him very fast, that in order to avoid a collision he pulled over to the right and permitted the Pontiac to pass him on the left. That the Pontiac then came past him, went ahead of him and came to a screeching halt; that two men got out of the Pontiac and got into a white Cadillac; that one of the men was carrying a brown paper bag. This witness identified Croft as the driver of the green and white Pontiac. He testified that the white Cadillac was parked near a cemetery; that after the two men got into the white Cadillac the Cadillac moved at a slow pace, that he, Zima, caught up to it and drove parallel to the Cadillac for 2 to 4 seconds; that he saw the driver of the Cadillac whom he identified as the defendant Tolliver; that the two cars were travelling in a parallel course; that they reached a corner and the white Cadillac indicated that he wanted to make a right hand turn and that Zima motioned him on and made a right hand turn himself; that he followed the Cadillac a short distance and then he, Zima, made a U-turn at the cross section where he saw a police car; that he waved to the police car and asked them whether there was a heist to which the police said that a bank had been robbed; he told the police what he had seen;

he showed the police where the green Pontiac was parked, stayed with the police at the location of the green Pontiac 15 or 20 minutes then went on to New Highway and there saw the two defendants again. This witness testified that while the white Cadillac was parked he did see the defendant Tolliver's head turned back in the direction from which the green and white Pontiac was coming. On cross examination he testified that there was nothing uncommon or unusual about the actions of the Cadillac that he did not notice whether while it was waiting the engine was running; that it was not speeding; that it did not screech out; that it did not try to pass him; that the driver did not honk the horn or yell; that he could see the three men in it talking but could not hear what was said; and that after the two men got in the Cadillac moved at a slow rate; that there was nothing unusual about the actions of the Cadillac; that he could see the brown paper bag but could not see what was in it; that he saw no masks, no guns, and saw no one throw anything out of the car. (TR399-508).

The following two witnesses were police officers:

(7) Walter Ryan, a police officer from Suffolk County Police Department, testified that he responded to a call of a bank robbery; that he saw the white Cadillac pass him; he corroborated Zima's testimony as to what Zima told him he had seen and Zima took him to where the green Pontiac was and that after which

Officer Ryan delivered Zima to federal agents. He testified that the white Cadillac was not going fast when it passed him; he testified that when Zima viewed / the defendants at New Highway after leaving the green and white Pontiac he thinks they were escorted by police officers. (TR508-530).

(8) Eugene Smith, a patrolman with the Suffolk County Police Department, testified that after hearing about the bank robbery and the white Cadillac over his radio, he went on the Southern State Parkway where he parked on the grass and waited for the Cadillac to come; that the Cadillac was moving "slow". (TR530-547).

(9) The next witness was agent Kenneth Sooker. He testified merely as to a statement which he had taken from Croft after giving Croft his warnings and after he had arrested him. He testified that Croft told him that he awakened at 7:30 on the morning of July 20, 1976; that he had walked to the corner which took him half an hour; that at 8:00 o'clock he met Tolliver in his white Cadillac; that they went looking for action; that he, Croft, was looking for a friend from whom he wanted to borrow some money; that they never went to the Mardi Gras Lounge and that he never left the defendant's car until he was apprehended. With respect to the identification by Zima of the defendants, Agent Sooker who was present testified that when Zima saw the defendants they were escorted by police officers and that he, Zima, knew that the defendants had been arrested in the white Cadillac. (TR550-570).

(10) Dennis Inbesi, was the next witness who testified that he owned a green and white Pontiac which he had left at the station on the morning of July 19th; had gone into the city and upon his return in the evening of July 19th the car was gone. The witness looked at a photograph of the green and white Pontiac in which Croft and the other man were riding and testified that it resembled his car. (TR604-611).

(11) The last witness was agent Lawrence Sweeney who testified concerning the statement which defendant Tolliver had made to him after he had arrested him and after he had been given his rights. He testified that Tolliver said that he and Croft had gotten together late in the evening of July 19th or the early morning of July 20th and that they had been gambling; that at 9:15 the two of them, he and Croft, were outside the Mardi Gras Lounge dropping off numbers; that Tolliver refused to give names of any people with whom he had been because he did not want to get them involved.

This concluded the government's testimony.

Defense counsel made a motion to dismiss in behalf of the defendant Tolliver on the ground that there was no proof that he had aided and abetted the commission of any crime. The Court denied the motion on the ground that his physical participation plus the inferences which could be drawn from his statement which certainly appeared to be a false statement, was sufficient to take the case to the jury. Immediately thereafter, the

defendant Croft pleaded guilty to count 2 of the indictment, at which point defense counsel for Tolliver asked for an opportunity to assess her position. She intimated that she might want the jury to know that the defendant Croft had pleaded guilty and the Court warned her of the danger of such a position. Thus at page 630 of the record:

> "The Court: You see, ordinarily, if I can put this in first, ordinarly co-defendants do not want the fact that another co-defendant has pleaded guilty to creep into the record in any way. What you are saying is a little bit like saying that this time I don't care, perhaps I even like it a little better if it were that way, but I'm not sure you're going to think that way tomorrow morning."

Counsel did question the evidence that had been introduced with respect to Croft, the exhibits, his shoes, his clothing, and what effect that might have on the defendant Tolliver. The Court did say that it would have to strike from the record Croft's statement to Agent Sooker; the Court did mention to counsel the possibility of having Croft as a witness (TR 634). It was obvious that defense counsel was thinking about moving for a mistrial but on the following morning she decided not to move for a mistrial and requested the Court to instruct the jury that Mr. Croft had pleaded guilty. Obviously she was of the opinion that if Croft was guilty the jury might let Tolliver off. (TR 629-656)

"Mrs. Seltzer: Then I jsut can't put him on. My other application is this. I thought it over. I do not want to move for a mistrial, but I do want Your Honor to instruct the jury, if you would, that the reason Mr. Croft is not here is because he pled guilty.

"Mr. Adlerstein: The government has no objection to that." (TR 656)

The Court then proceeded to instruct the jury as follows:

"I should now tell you that the defendant Croft pleaded guilty to count 2 of the indictment and that means that he is no longer a party to this trial and there was admitted into evidence here testimony about the statement that he made on July 20th at the time of his arrest to Mr. Sooker.*

* * *

The evidence as to that statement was evidence admissible only against Mr. Croft and must now be, and is stricken from the record and you must erase it altogether from your minds. Nothing that was said in that confession will be regarded by you as truthful or false. It can be** taken into account in evaluating the case and all of the evidence as against the defendant Tolliver.

That's a little hard to do but I know you can do it."

Although the two remaining counts were to be dismissed, as against Croft the jury was not informed of this.

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*Defendant's motion to excude Croft's statement under Brutton was deni

**Obviously a typographical error, it should read cannot be taken.

In his summation the Assistant U.S. Attorney made no mention of the defendant Croft's plea of guilty. However, Legal Aid Counsel for Tolliver after commenting on the paucity of evidence against her client, to wit, that he was seated in his car, that he was arrested, that the people who committed the bank robbery were in his car, and that none of the proceeds were found, went on as follows:

> "I would ask you to consider the fact that Willie Croft pled guilty and Mr. Tolliver did not. Whatever that's worth I would suggest that you give it consideration." (TR 683).

In his reubuttal summation for the first time the Assistant U.S. Attorney commented on the fact that Croft had pleaded guilty as follows, (paraphrasing the argument of the defense attorney):

> "See Mr. Croft has pleaded. Mr. Tolliver still sits here, therefore, Mr. Croft must be guilty and Mr. Tolliver must not be guilty."

CHARGE OF THE COURT:* (Appendix$_D$)

The Court was of the opinion that since Tolliver was charged only as an aider and abettor the jury had to consider the evidence with respect to the underlying robbery committed by Croft and the other man. (TR 631).

The Court instructed the jury that in order to convict the defendant they had to find that Croft and another man had

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*The charge which is in Appendix D contains penciled corrections which were not made by counsel.

taken the money from the bank. Thus at page 690 the Court instructed the jury as follows:

> "You must, however, in passing on the charges against Mr. Tolliver first determine in considering the first two counts, whether the bank robbery described in those counts was committed by Croft and another man, for if you conclude that Mr. Croft did not participate in that bank robbery, then you cannot find Mr. Tolliver guilty on count 1 or count 2, for in substance, he is charged with aiding and abetting Mr. Croft in the bank robbery. Similarly, in passing on count 3, you must determine whether or not Mr. Tolliver and Mr. Croft conspired with each other." (TR 690-691).

Again at page 698 the Court instructed the jury:

> "The essential elements of count 1 of the indictment, all of which the government proved beyond * a reasonable doubt or else you must acquit the defendant on count 1 are the following:
>
> First, that the defendant Croft and another man took money from the bank employees or from their presence;
>
> Second, that the money, when the defendant Croft and the other man took it, was in the bank's possession;
>
> Third, that the defendant Croft and the other man took the money by force and violence, or by intimidating the bank employees;
>
> Fourth, that the deposits of the bank were at the time insured by the Federal Deposit Insurance Corporation; and
>
> Fifth, that the defendant participated in the bank robbery in that, knowing that the defendant Croft and the other man had robbed the bank, he intentionally helped them to escape capture.

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* Probably should read "must prove."

"If the government proves each of these five essential elements of count 1 beyond a reasonable doubt, you will convict the defendant on count 1. If the government fails to prove any one or more or all of the essential elements of count 1 beyond a reasonable doubt, then you must acquit the defendant on count 1.

The essential elements of count 2 are exactly the same as those of count 1, plus the element of assault or putting life in jeopardy by use of a dangerous weapon."

And then the Court went on and outlined the elements of count 2. (TR 698-700).

On page 702 the Court went on:

"The five essential elements of count 1, now, as I said earlier, also refers to five or the six essential elements of count 2. That is one cannot be guilty of count 2, without also being guilty of count 1. But if there was no assault or placing life in jeopardy by use of a dangerous weapon there can be no conviction on count 2. The offense charged in count 1 is just what it's called an included offense within count 2." (TR 702).

The Court instructed the jury on the conspiracy count as follows:

"There is no charge that there were any conspirators other than defendants Tolliver and Croft. Hence, there can be no conviction of the defendant on count 3 unless you find that the government has shown beyond a reasonable doubt that defendant conspired with defendant Croft and that both drove in the Cadillac on the day of the bank robbery for the purpose of carrying out the conspiracy to rob the bank." (TR 708).

Although the Court had instructed the jury that defendant Croft's statement was not to be considered by them and that it had been stricken from the record, Exhibits which related solely to the defendant Croft remained on the record - these were the platform shoes and the shirt which he had worn on the day of the robbery and which had been identified by several witnesses as his as well as a photograph and testimony concerning the green Pontiac which the government alleged and which the proof showed had been stolen from the witness Inbesi. The record is not clear as to whether the jury requested the exhibits, however the record is clear that counsel made no objection to the consideration of these Exhibits by the jury. This was in keeping with the position she had taken that the guilt of the defendant Croft should remain with the jury at all times.

The jury went out at 1:30. About an hour later it came back with a note requesting the testimony of FBI agents referring to Croft and Tolliver's whereabouts before 9:00 A.M. on the day of the robbery. The Court again instructed the jury that Croft's statement to Sooker had been stricken from the record, that they were to dismiss it from their minds and that it wasn't evidence against Tolliver to any degree. It then proceeded to have Agent Sweeney's testimony with respect to Tolliver's statement read to the jury (TR 721-722). About an hour and a half later the jury sent in another note:

"Does the verdict on count 3 require the same verdict on counts 1 and 2?"

There followed colloquy between the Court and counsel with respect to the law on aiding and abetting and conspiracy. (TR 724-728). At 728 the Court instructed the jury not specifically on the question that it had asked but generally that it should consider each count separately and determine whether the government had established the essential elements of each count. It did not instruct the jury on the difference between aiding and abetting and a conspiracy. (TR 728).

At no time during the inquiries by the jury did counsel for Tolliver object to the Court's instructions or make a motion for a mistrial. The Court recessed on October 1 until October 5th there being an intervening holiday. On October 5th at 12:30 P.M. the jury returned a verdict against the defendant Tolliver of guilty of counts 1 and 3, and not guilty on count 2.

THE 2255 HEARING
(4/13/77-TR1-180)

On March 20, 1977 defendant Tolliver filed a motion under Section 2255, 28 U.S.C., seeking to set aside his conviction charging that he was denied the effective assistance of counsel. In support of that motion he filed two affidavits sworn to by Billie Croft in which Croft swore that after he pleaded guilty he was told by both counsel to stay away from the courtroom inasmuch as his plea of guilty had cleared defendant Tolliver; that he was willing then and is now and in the future to testify on behalf of Tolliver. He also stated that defendant had no knowledge of the bank robbery; that he had met defendant at a card game early on July 20, 1976 and had asked him to pick him, Croft, up in East Farmingdale at 9:15 A.M. He stated that he and Tex had robbed the bank and then had met defendant as agreed, and that at that time defendant asked him, Croft, what was wrong. The facts upon which the denial of effective assistance of counsel was predicated were the failure of counsel to move for a mistrial at the time Croft pleaded guilty, and the failure of counsel to interview and call Croft as a witness to exonerate the defendant Tolliver, and the failure of counsel to cross examine the witness Zima as to his inability to identify Tolliver the first time he saw him on the line-up, as well as counsel's stress to the jury of the plea of guilty entered by Croft. Counsel for Tolliver argued then that the

case against Tolliver was extremely weak and that it rested on inadmissible evidence relating to Croft.

The Court held a hearing at which Croft, Tolliver and both counsel for the defendants testified. Croft further testified that originally he had asked defendant for a loan of his car but that defendant said that his wife did not want him to lend it and that he agreed to pick Croft up; that Croft said he would meet defendant after he returned a car which he had borrowed from a friend; that the bag containing the masks, the money and the guns was never visible to defendant; that when he skidded to a stop in the green Pontiac next to defendant's white Cadillac he explained to defendant that he had had a fight with the foreman of the man whose car he had borrowed and he feared that the foreman had called the police; that he never told defendant he had robbed a bank; that defendant did not know Tex and that defendants never spoke to each other and that the only conversation he had with the defendant was to ask him to tell the police that he had been gambling with him all night. Croft further testified that both attorneys told him that the plea of guilty would acquit defendant and that counsel for defendant Tolliver told him that she did not need his testimony and not to come to the Courtroom and that he had done defendant a big favor. He further testified that

after the verdict of guilty he told defendant how sorry he was that he had implicated him and that he would put in an affidavit on his behalf; that defendant never asked him to put in an affidavit.

Defendant Tolliver's tsetimony corroborated that of Croft. He stated that he had been playing cards all night and that Croft had asked him to pick him up at the cemetery. Tolliver testified that he had gone home after the card game forgetting completely about Croft's request to pick him up and that he later remembered and went to meet him. That in order to protect Croft he told the agents that they had been playing cards all night. He testified that before the summation and after Croft pleaded guilty he told counsel that he had lied about being with Croft all night. He said he never noticed whether Tex had a paper bag and did not know Tex and that neither one of them spoke to each other.

Counsel for defendant Tolliver testified that she never discussed the possibility of Croft's testifying for defendant; that she did not remember telling Croft that his plea of guilty would clear the defendant; she testified that she requested that the Court tell the jury that Croft had pleaded guilty. She explained her decision not to seek a mistrial on the basis that if there were a second trial the United States might call Croft to testify against defendant; that she felt that Croft's

plea of guilty might satisfy the jury and that they might acquit the defendant; that at a second trial without Croft, even if Croft were made to testify, the jury might convict Tolliver because he was the only defendant. On cross examination she admitted that probably the statement of Croft to Agent Sooker would not be admissible against the defendant Tolliver and (at TR 159) the Court had the following to say:

> "The Court: Now here is his point." (Referring to the point being made by counsel for Tolliver on cross examination). "You knew at page 721 of the trial that notwithstanding the instruction to the jury here they were homing in on Croft's statement but only Tolliver was on trial.
>
> "Now, what he wants to know, as politely as he can inquire, is why in the world didn't you move for a mistrial right then and there on the ground in Bruton that it isn't possible for the jury to overcome the effect of damaging testimony like that?"
>
> "The Witness: I? I don't recall.
>
> "The Court: Well that's the question."

With respect to her failure before the jury to cross examine the witness Zima on his inability at first to identify the defendant Tolliver on the line-up and his private conversations with the agents and the police, she explained this as based on a fear that to further examine this witness, who was a good witness on identification, would emphasize the certainty of his identification; that she was unwilling in this case to impeach the credibility of the

agents and the police by suggesting that they had told the witness who the defendant was. She did admit that this witness was most important to the government's case.

Agent Sweeney testified to the effect that he was present at the conversations relating to the plea of guilty of Croft and that the U.S. Attorney said that Croft's testimony against defendant was not necessary. He did testify that Croft told him that he could not implicate the third man because he feared for his and his family's life and that the third man had been introduced to him by the defendant.

Counsel for Croft testified in his opinion Croft's plea "was a big help to Tolliver". (TR 28).

Judge Dooling rendered a written decision, (Appendix F), in which he found that the testimony of both defense counsel contradicted that of Croft and the defendant; that counsel did not tell Croft to stay away, that he had exonerated defendant; that Croft in cooperating with the U.S. Attorney would have to identify the other man who robbed the bank with him, not the defendant; that agent Sweeney testified that the government would not want Croft to testify against Tolliver. He found that defendant's counsel had no recollection of any discussion with Croft or his counsel about Croft's testifying or about the fact that Croft's plea had cleared defendant. The Court found that the defense used by counsel was that defendant although

present at the "switch" had no knowledge of the robbery; that it was her opinion that with Croft as a defendant in the case defendant stood the best choice of acquittal because the "manifest guilt of Croft) could help to underline the purely circumstantial nature of the case against petitioner". (Appendix F, page 5). The Court found that the failure of counsel to call Croft as a witness was natural and expectable in the circumstances and did not represent want of competency or diligence on her part; that she had no basis for bringing in Croft to testify, that he had not offered to do so, and that it was expected that if he did testify he would do so for the government as a rebuttal witness. The Court further found that if Croft had testified as a defense witness Tolliver would have had to testify and that with his prior bank robbery conviction he would not have been helped. In conclusion Judge Dooling said that the testimony of neither defendant was credible and that even if it were treated as newly discovered evidence the Court could not say that it would have prevented the verdict of guilty against Tolliver.

POINT I

THE COMBINED ERRORS OF THE COURT AND COUNSEL DEPRIVED APPELLANT OF A FAIR TRIAL AND OF HIS RIGHT TO COUNSEL.

THE COURT'S ERRORS

The acceptance of the plea of guilty of Croft on the eve of the jury's deliberations, without adequate cautionary instructions to the jury, or without declaring a mistrial as to appellant, sealed the fate of the appellant in the eyes of the jury. It was impossible for them to separate Croft's guilt from that of appellant.

Appellant recognizes that the errors hereinafter discussed flowed from the position taken by defense counsel. The Court, however, had a non-delegable duty to safeguard the rights of the accused - even if in doing so it had to override counsel's strategy. ABA Project on Standards for Criminal Justice, The Function of The Trial Judge, Part I, Sec. 1.1. So, too, did the government attorney have a duty to see that defendant was not prejudiced by the government's action.

It is difficult to fathom why, after the whole powerful case was in, the government permitted Croft to plead to less than the whole indictment. At any rate at that point the Court

should have exercised its discretion and done one of several things: either refuse to accept the plea, or cautioned counsel that if it did so, it would have to declare a mistrial as to appellant.

Given the fact thatappellant was charged merely as an aider and abetter of Croft, (not of the third man), and that to convict him, the jury would have to find that Croft was guilty as well - the usual cautionary instructions - that the jury was not to speculate on the absence of the co-defendant and not to know of the plea, were not possible.

In order to prove one an aider and abetter, one must prove the underlying crime aided and abetted. U.S. v. Schwartz, 548 F. 2d 427 (2nd Cir., 1977). A verdict of not guilty for Croft would result in a verdict of not guilty for appellant.

Under the facts of this case and the charge of the Court, a plea of guilty by Croft resulted in a directed verdict of guilty against appellant.

That Judge Dooling was troubled was evident - he cautioned counsel against telling the jury of the plea of guilty of Croft and yet, recognized the simultaneous impossibility of telling the jury that it must not consider the plea of guilty of Croft as bearing on the guilt or innocence of appellant, since this is just what they had to consider before they could determine appellant's fate as an abetter. Neither counsel in their

summations nor the Court in its charge warned the jury that Croft had not pleaded guilty to the conspiracy or to count one. That left the jury with no alternative but to find appellant guilty of conspiracy - as they were the only two conspirators charged.

Certainly on this count, the Court should have charged the jury on the elements of conspiracy per se and as distinguished from aiding and abetting. United States v. Garguilo, 310 F. 2d 249 (2nd Cir., 1962); United States v. Schwartz, supra. But even here the Court was in a trap, since the only underlying act which would make appellant a conspirator was the very act which made him an aider and abetter - of the underlying proved robbery.

So too with count one - the jury may well have assumed that by pleading guilty, Croft had admitted all the facts testified to - including the escape in appellant's car. The Court's instruction, therefore, that they had to find the sixth additional element of appellant's participation - the driving of the car - may well have been mooted in the jurors' mind.

The jury recognized the problem facing it on the conspiracy and aiding and abetting when it asked whether a finding of guilt on count three compelled a similar finding on count one

and when it proceeded to answer the question to its satisfaction, in the affirmative, without the aid of the Court. (TR 724-727).

Moreover the Court told the jury that the government did not have to prove that each defendant had done all the acts enumerated -this may have removed the need to find defendant's knowledge; also, that before it could convict appellant it had to determine whether Croft had in fact committed the robbery.

Then too, the Court referred to the indictment as charging Croft and another man with the robbery - and of the jury's duty to determine that fact before they could convict appellant - whereas the indictment charged Croft and appellant only - no third person - with robbery. The jury certainly must have wondered why it was deliberating on something which had already been decided by Croft's plea.

Finally, there was the indisputable fact that the jury could not erase from its mind and consideration Croft's statement which gave the lie to appellant. The irreparable damage done to defendant - the only evidence of guilt - was recozniged by Judge Dooling during the 2255 hearing: (Referring to Croft's statement):

> "The Court: Yes. But they asked for it nevertheless and they knew, as the jury always knows, A, what evidence was, and B, what they wanted to hear about it. They knew darn well that each statement completely exculpated both the maker of the statement and the other man. And they wanted to know what precisely did they say about where they were at 9:00 o'clock. Because that was almost the focus of the discrepancy. Because that was where the Mardi Gras Grille came up. One had said that at that very hour they were dropping tickets at the Mardi Gras Grille and the other said no such thing. They knew what they wanted."

Brutton v. United States, 391 U.S. 123; Krulewitch v. U.S., 336 U.S. 440.

In addition to this, the jury had before it - and this, it was not told to disregard - the damaging testimony of the guns, the threats, the placing of lives in danger, Croft's clothing, the stolen car - in fact the greater part of the testimony - which did not relate to appellant. The only evidence as to appellant being the eyewitness Zima.

This case presents the exceptional situation where the prejudice from a plea of guilty so outweights the benefit to be derived from the plea that the Court in its discretion should refuse to accept it or impose conditions. Particularly is this so where the plea is offered at the end of the trial.

Whether a trial judge has abused his discretion in declining or accepting a plea is to be determined by what was before the Judge "at the time he was asked to accept Nevedo's guilty plea." United States v. Nevedo, 516 F. 2d 293, 297 (2nd Cir., 1975).

In United States v. Kimbrew, 380 F. 2d 538 (6th Cir. 1967) a co-defendant pleaded guilty in the middle of the trial. The Court said in denying defendant's motion for a mistrial:

> "Courts of review have been sensitive to aggravating circumstances... Because of the danger that a jury will infer that the remaining co-defendants who have not changed their pleas are nevertheless guilty." (p. 540).

In United States v. Crosby, 294 F. 2d 928 (2nd Cir.,1961) this Court answering a similar argument, upheld a conviction of non-pleading defendants because proper cautionary instructions had been given to the jury, which the jury had heeded since it acquitted some defendants, and because there was overwhelming independent evidence of co-defendants' guilt.

In United States v. Kelly, 349 F. 2d 720, 767 (2nd Cir., 1965) Judge Medina upheld a conviction, because the jurors were not in any way apprised of the plea of guilty of co-defendants and because the Court gave specific and ample instructions that the jury was not to consider the guilt of testifying co-defendants, who had pleaded guilty, in determining appellant's guilt. See also Cohen v. Wainwright, 418 F. 2d 565 (5th Cir., 1969).

COUNSEL'S ERRORS

The above discussion points up defense counsel's principal error in permitting the jury to infer appellant's guilt from Croft's plea and in not objecting to the plea at that stage. In addition, appellant points to her failure to consult with Croft on his possible exoneration of appellant - which might have resolved everything; her failure to bring before the jury the infirmities and weaknesses surrounding Zima's identification of appellant - which was the only evidence implicating appellant;

and her failure to request instructions on aiding and abetting, conspiracy and eyewitness identification.

Counsel had ample opportunity to re-assess her original "gamble" - that the jury might be satisfied with Croft and let appellant go. When it looked as though they would do no such thing and were considering inadmissible proof (Croft's statement) - she should have moved for a mistrial and it is most likely that Judge Dooling would have granted it.*

As for counsel's reluctance to cross examine Zima and the agents on the line-up identification - it is difficult to see how this could have hurt appellant's case. At the very least it might have raised in the minds of one juror a valid question as to why the government acted in so sly a fashion vis à vis counsel. Certainly there could be no intimation that she would have been disruptive or threatening.

Appellant is well aware of this Court's standard for testing effective representation. United States v. Wight, 176 F. 2d 376, cert. den. 338 U.S. 950 (1950); United States v. Currier, 405 F. 2d 1039, cert. den. 395 U.S. 914 (1969);

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*Footnote: Of course, it is easy for present counsel with a full record before her to pass judgment on trial counsel - who was then under the tremendous pressure of having to reach instantaneous decisions before and while the jury was deliberating. In the interests of justice the Court should have offered some guidance.

United States v. Dubar, Docket #76-1140; 2nd Cir. 6/30/77.

However it is submitted that the combination of factors here - the errors of counsel for both sides - compounded by the errors of the Court resulted in a

> "total failure to present the cause of the accused in any fundamental respect." United States v. Garguilo, 342 F. 2d 795 (2nd Cir., 1963).

For these reasons, the conviction must be reversed.

POINT II

THE EXCLUSION OF COUNSEL FROM THE POST-INDICTMENT LINE-UP VIOLATED APPELLANT'S RIGHTS - THE COURT SHOULD HAVE EXCLUDED ALL IDENTIFICATION BY ZIMA.

Although Judge Dooling refused to suppress the identification of defendant by the witness Zima,* he did so reluctantly and with a clear invitation to have this Court examine the question carefully (and perhaps reverse him!). He was critical and disturbed by the government's procedure (Tr./10, 14-16, 32-34).

The government advanced no satisfactory explanation for excluding counsel from the actual identification. Mr. Adlerstein refused to give any reason whatsoever; Agent Sweeney said that FBI procedures permitted either method. (TR 203).

It is difficult to conceive of any policy consideration which would justify excluding counsel, for counsel was left in the dark as to whether any unfairness had taken place. As the Court pointed out she was bound by the testimony of the government witnesses, and agents - when she should not have been.

The government cited United States v. Davis, 399 F. 2d 948

Footnote: Defense counsel was not given access to Zima prior to the line-up.

(2nd Cir., 1968), in support of the validity of the show-up identification procedure - an identification which was not in issue at the hearing. (TR 10).

In United States v. Wilcox, 507 F. 2d 364 (2nd Cir. 1974) - relied on by defense counsel - this Court said: Wade, Gilbert and Stovall,

> "Make it equally clear that in-court identification testimony will be excluded if it follows confrontation had in the absence of counsel, unless it can be shown that the in-court identification had an independent source or constituted harmless error." (368)

The Court there upheld the identification. But there were two significant differences: the witness there identified the defendant, was interviewed by the government and then "re-affirmed" her previous identification; was again interviewed by the government, without objection by counsel, and was then immediately made available to defense counsel for interview. (Underlying supplied).

The three cases relied on by Judge Dooling and discussed in Wilcox, Cunningham, Banks, and Doss - presented no question of mistaken or dubious identification corrected after the government interview - as was the case here. (Underlying supplied).

Added to this, was the failure of counsel to bring these facts to the attention of the jury on cross examination, (as suggested by Wilcox (371)), her failure to request cautionary instructions, the length of time between the crime and the line-up, the complete absence of any other evidence linking

defendant to the crime charged, and the short period of time during which Zima, driving a car, observed defendant - in profile, with sunglasses on, in a moving car. Cf: United States v. Gentile, 530 F. 2d 46, (2nd Cir., 1976); United States Ex Rel Springle v. Follette, 435 F. 2d 1380 (2nd Cir., 1970); United States v. Fernandez, 456 F. 2d 638 (2nd Cir., 1972); Simmons v. U.S., 390 U.S. 377 (1968).

The conviction should be reversed on the ground of illegal identification.

POINT III

THERE WAS INSUFFICIENT INDEPENDENT EVIDENCE TO SUSTAIN THE APPELLANT'S CONVICTION.

Prior to the entry of the plea of guilty of Croft, defense counsel moved under Rule 29 on the ground that the only evidence which the government had shown was that appellant drove his white Cadillac for 15 minutes with Croft in it. In denying counsel's motion the Court ruled that the physical presence of defendant in the white Cadillac plus the inference to be drawn from his statement - false at that time when compared with that of Croft - would be sufficient to sustain a conviction.

When Croft pleaded guilty, Croft's conflicting statement was eliminated from the jury's consideration and all that remained was defendant's mere presence in the car after the robbery and his now uncontradicted statement that he had been gambling with Croft all night. There was no proof whatsoever at any conversation, any reason, any act, any knowledge on the part of defendant other than the neutral act of driving the white Cadillac. In fact, that was the only overt act charged to the defendant. A perfectly legal act which the defendant did not deny. There was no evidence of any crime found in the Cadillac.

The Courts have repeatedly held that mere presence at the scene of a crime even with knowledge of an intended illegal act is not sufficient to establish one a member of a conspiracy. Ianelli v. U.S., 95 Sup. Ct. 1284 (1975); Direct Sales v. U.S., 319 U.S. 703 (1943).

At the very least "there must be some basis for inferring that the defendant knew about the enterprise and intended to participate in it or make it succeed." U.S. v. Cirillo, 449 F. 2d 872, 883 (2nd Cir., 1974); U.S. v. Johnson, 513 F. 2d 819 (2nd Cir., 1975); U.S. v. Rosenblatt, 554 F. 2d 36 (2nd Cir., 1977).

Although aiding and abetting differs from conspiracy in that there must be proof of the underlying crime the acts charged to an aider and abettor and to a conspirator are the same. The additional element required for aiding and abetting, that is the proof of the underlying crime - indubitably present here - does not add one iota of proof to defendant's participation. If the evidence is insufficient to sustain a finding of conspiracy it follows that it must be insufficient to sustain a finding of defendant as an aider and abettor.

Moreover since Croft had only pleaded to count 2 and the other counts were to be dismissed, it is impossible to sustain a conviction of conspiracy against defendant on count 3 since he could not conspire alone.

In any event the counts are duplicitious since the conspiracy charged in count 3 would merge in the aiding and abetting charge in count 1 which requires the greater proof.

> "You cannot have aiding and abetting unless you prove the substantive crime has been committed. In conspiracy you do not have to prove that the substantive crime has been committed, because it is the agreement, the going in with others to commit the crime that the law prescribes and says is a crime, and not the commission of the crime." (Language of trier court approved by this Court in U.S.A. v. Schwartz & Sarkis, 548 F. 2d 427, (2nd Cir., 1977).

For these reasons the conviction must be set aside.

POINT IV

THE RELIEF SOUGHT BY THE 2255 MOTION PRESENTED THE COURT WITH A LAST CLEAR CHANCE TO SEE THAT JUSTICE WAS DONE - JUDGE DOOLING SHOULD HAVE SET ASIDE THE CONVICTION.

Judge Dooling found that counsel's failure to call Croft as a witness for appellant was understandable and represented no deriliction of her duty as counsel. Appellant relies on the argument supra.

His second finding that even if Croft had testified the verdict would have been no different is incomprehensible - quite the contrary would seem to follow - and on this ground the motion should have been granted. United States v. Kahn, 472 F. 2d 272, 287 (2nd Cir.) cert. den. 411 U.S. 982.

CONCLUSION

The conviction should br reversed because of pervasive eggregious error on the part of counsel and the court which deprived appellant of a fair trial and because the independent admissible evidence was insufficient as a matter of law.

Respectfully submitted,

HELENA PICHEL SOLLDER
Attorney for Defendant-
Appellant

AFFIRMATION OF SRVICE BY MAIL DOCKET NOS. 77-1017, 2055

UNITED STATES V. PHILIP FLOYD TOLLIVER - DEFENDANT APPELLANT

HELENA PICHEL SOLLEDER, attorney for appellant, affirms under penalty of perjury, that on the 15th day of September, 1977, she served two copies of the Appellant's Memorandum of Law and Appendix upon Lee Adlerstein, Assistant United States Attorney of the Eastern district, in charge of this case, at 222 Cadman Plaza, Brooklyn, New York, by depositing in the mail the two copies enclosed in a sealed envelope addressed as above.

Dated, New York, N.Y.
September 15, 1977.

Helena Pichel Solleder